Dissolution on ground of conversion to Islam
(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce.

It is therefore clear that under the law, a non-Muslim marriage is not dissolved upon one of the parties converting to Islam. It only provides a ground for the other party who has not converted to petition for divorce.

The power of the court to make a declaratory judgment is discretionary. The court will not make a declaratory judgment when the question raised is purely academic. The court should not be required 'to answer academic questions' — *Howard* v *Pickford Tool Co Ltd.*[2] Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, ie relieve him from any liability or disadvantage or difficulty: *Thorne Rural District Council* v *Bunting.*[3]

I find that the declaration prayed for is purely academic. The plaintiff is not going to benefit in any way from the declaration. He is not asking for any consequential relief. He is only asking for a declaration of a mere legal right. Counsel for the plaintiff says that the court ought to make the declaration prayed for in view of the letter dated 10 April 1987 written by the Kadi Besar to the plaintiff as stated above to the effect that if he did not become a Muslim following his wife, his marriage to the wife would be dissolved in accordance with the Islamic law. In my view, the assertion of the said Kadi Besar did not and will not affect the plaintiff's legal position in the eyes of his own personal laws and the civil laws of the country. He will therefore not benefit in any way by the declaration prayed for.

I therefore dismissed the application. In the circumstances of the case, I felt that I should not order costs against the plaintiff. I therefore ordered that each party bear his own costs.

Application dismissed.

Solicitors: *Karpal Singh & Co; Daud, Thevendran & Partners.*

Nordin Hamid & Co v Pathmarajah & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-70-89
EUSOFF CHIN J
31 MARCH 1990

Administrative Law — Right to be heard — Breach of natural justice — Refusal by Industrial Court to adjourn hearing — Counsel for applicant discharging themselves — Representatives of applicant firm not present to give evidence — Principles regarding adjournment — Whether Industrial Court acted reasonably or in excess of jurisdiction or in breach of rules of natural justice

The applicant, a legal firm, applied for an order of certiorari to quash the Industrial Court Award No 70 of 1989 made on 2 May 1989 upon a reference by the minister under s 20(3) of the Industrial Relations Act 1967 ('the Act') arising out of the dismissal of the first respondent (an advocate and solicitor) by the applicant without just cause or excuse. The applicant named the Industrial Court as the second respondent. The main ground of the application is that the applicant was not afforded by the Industrial Court a reasonable opportunity to be heard.

It was submitted by counsel on behalf of the applicant that on the hearing date on 24 April 1989, counsel for the applicant applied for adjournment on the four grounds stated in the judgment. The Industrial Court refused to grant the adjournment and, upon counsel for the applicant discharging themselves, proceeded with the hearing and made an award ($67,500) in favour of the respondent. No one from the applicant firm gave evidence. Counsel for the applicant contended that the Industrial Court had acted in breach of the rules of natural justice. Counsel for the respondent contended that this was not a case where the Industrial Court had suddenly fixed the hearing, giving the parties insufficient notice so that the applicant was taken by surprise. The applicant is a legal firm which should know what to do in the matter. The parties were given seven months to prepare their cases and the applicant had not filed its statement in reply. The applicant had not applied to the High Court for an order to stay the proceedings in the Industrial Court. The main question for decision is whether the Industrial Court had in the circumstances exercised its discretion correctly by refusing further adjournment of the hearing.

Held, dismissing the application:

(1) The Industrial Court had in the circumstances exercised its discretion correctly by refusing further adjournment of the hearing. It appears that the applicant was not serious in defending itself at the Industrial Court. The applicant was ordered to submit its statement in reply by 11 February 1988, but it failed to do so. It asked for and was granted extension of time to file the statement in reply. But even by the final date of hearing on 24 April 1989, the applicant had not filed its statement in reply in the Industrial Court proceedings. The applicant's failure to file a statement of reply was not explained by the affidavit evidence of the senior partner of the applicant firm.

(2) Having regard to the background of the proceedings, the conduct of the applicant before the Industrial Court, and the requirements of s 30(3) of the Act, the court found that the Industrial Court had acted reasonably, and had not acted in excess of its jurisdiction or in breach of the rules of natural justice when it decided to proceed to hear and dispose of the reference notwithstanding the last minute application for the adjournment and the subsequent act of the applicant's counsel discharging themselves from acting for the applicant.

(3) On the evidence, the Industrial Court made its findings of fact and came to the conclusion that the respondent was constructively dismissed by the applicant without just cause or excuse. The Industrial Court also concluded that it was not proper to order reinstatement in this case and consequently made the appropriate award of compensation and arrears of wages to be paid to the respondent. In the circumstances, the court did not see in what way the award of the Industrial Court was perverse since that court had considered the whole evidence before it.

[*Editorial note*: The applicant has appealed to the Supreme Court vide Civil Appeal No 02-122 of 1990.]

Case referred to
1 *Lee Ah Tee* v *Ong Tiow Pheng & Ors* [1984] 1 MLJ 107 (folld)

Legislation referred to
Industrial Relations Act 1967 ss 20, 29, 30
Industrial Court Rules 1967 r 10(1)

P Kuppusamy for the applicant.
Wong Kim Fatt (*V Chandran* with him) for the respondent.

Cur Adv Vult

Eusoff Chin J: The applicant, Nordin Hamid & Co (a legal firm) applies for an order of certiorari to quash the Industrial Court Award No 70 of 1989 made on 2 May 1989 upon a reference by the minister under s 20(3) of the Industrial Relations Act 1967 ('the Act') arising out of the dismissal of the [first] respondent by the applicant without just cause or excuse.

The main ground of the application is that the applicant was not afforded by the Industrial Court a reasonable opportunity to be heard.

Learned counsel for the applicant, Encik Kuppusamy, submitted that on the date fixed for the hearing before the Industrial Court on 24 April 1989, he had appeared, and sought an adjournment of the hearing because:

(i) he had that day to attend another hearing at another division of the Industrial Court, whose chairman was retiring;
(ii) he could not get his witnesses who were partners in the applicant firm because they had migrated to Australia;
(iii) he had to get instructions from the senior partner in the applicant firm, Encik Nordin himself;
(iv) he had in fact telephoned Encik Nordin who sent his legal assistant Cik Wi Yuen from the applicant firm to seek an adjournment of the hearing.

The Industrial Court had refused to grant the adjournment and upon Encik Kuppusamy and Cik Wi Yuen discharging themselves as counsel for the applicant, proceeded with the hearing and made an award in favour of the respondent.

I might have agreed with Encik Kuppusamy that under those circumstances, the Industrial Court had failed to exercise its discretion judiciously because by refusing to grant an adjournment, the Industrial Court had deprived the applicant of an opportunity to be heard and defend itself. The Industrial Court would then be acting in breach of the rules of natural justice when it proceeded to hear the reference and make the award.

However, an examination of the award and a perusal of the affidavits and documents filed in this court reveal the following events:

(a) The respondent had made a representation to the minister under s 20(1) of the Act that he had been dismissed without just cause or excuse and that the minister had on 26 December 1987, acting under s 20(3) of the Act, referred the representation to the Industrial Court for an award.

(b) On 22 February 1988, the applicant having obtained leave, filed an application vide KL High Court OM R8-32-14-88 for an order of certiorari to quash the minister's decision dated 26 December 1987. Then the applicant in that originating motion filed an application to cross-examine the minister on his affidavit. The hearing of the originating motion had been adjourned seven times before it was withdrawn in the High Court on 20 April 1989.

(c) Meanwhile, the Industrial Court took the following actions:

(i) On 30 December 1987, the Industrial Court sent by hand-despatched to both the applicant and the respondent notice of mention in Form F, and both parties acknowledged the receipts of the notice.

(ii) On the mention date, 11 January 1988, both parties were represented by solicitors. The Industrial Court fixed 18 October 1988 as the date of hearing of the reference, and ordered the respondent who was the claimant to file his statement of the case by 11 February 1988, and the applicant firm to file its statement in reply by 11 March 1988. The Industrial Court then served on the solicitors for both the parties notice of hearing (Form G) dated 14 January 1988 fixing the hearing on 17 and 18 October 1988.

(iii) On 28 January 1988, the solicitors for the respondent filed in the statement of case. On 29 January 1988, the form of statement in reply (Form J) was hand-despatched by the Industrial Court to the solicitors for the applicant. This was done in compliance with r 10(1) of the Industrial Court Rules 1967 (PU 406). A letter dated 29 March 1988 from the solicitors for the applicant was received by the Industrial Court requesting for extension of time to file in the statement in reply, which was granted.

(iv) The Industrial Court wrote a letter dated 16 September 1988 to both the solicitors to say that the hearing dates, 17 and 18 October 1988, be vacated to accommodate a part-heard case, so the case would be mentioned on 23 September 1988.

(v) A letter dated 22 September 1988 was received from the solicitors for the respondent to say that the applicant firm had not filed in the statement in reply.

(vi) The case was mentioned again on 23 September 1988 and a new date of hearing was given. A new notice of hearing (Form G) dated 23 September 1988 was hand-despatched to both solicitors fixing the new hearing date as 24 April 1989.

(vii) On the date of hearing, ie 24 April 1989, the respondent and his counsel were present. The applicant's counsel, Encik Kuppusamy, was present but no one came from the applicant firm to give evidence.

The Industrial Court award contains the following statements:

> Encik Kuppusamy states that he has three problems:
>
> 1) two former partners are in Australia;
> 2) application for certiorari; and
> 3) he has another matter in Court V; the chairman is to retire.
>
> The court adjourns to enable the firm to be present.
>
> The court resumes and Encik Kuppusamy discharging himself from the case, so he is discharged. Cik Wi Yuen (apparently from the firm) appears for the firm. When asked by the court to proceed, she informs that she has no instructions. The court orders the case to proceed, so she leaves the court room.

I find that the Industrial Court had in the circumstances exercised its discretion correctly by refusing further adjournment of the hearing. It appears that the applicant was not serious in defending itself at the Industrial Court. The applicant was ordered to submit its statement in reply by 11 February 1988. On 11 February 1988, it did not do so. It asked for extension of time to file the statement in reply, which was granted. On 22 September 1988, the respondent complained to the Industrial Court to say that he had not received the reply yet. Even on the final date of hearing on 24 April 1989, the applicant did not file its statement in reply in the Industrial Court proceedings. A statement in reply is necessary to give the claimant (respondent) notice of the grounds relied on by the applicant firm to rebut the claimant's claims.

The affidavit of Encik Nordin bin Abdul Hamid, a senior partner of the applicant firm affirmed on 9 June 1989, does not explain why no statement in reply was filed by the applicant. On the events which occurred in the Industrial Court on 24 April 1989, Encik Nordin stated at paras 28 to 36 of his affidavit as follows:

> 28 When the originating motion (against the minister) came up for hearing on 20 April 1989, I instructed my solicitors to discontinue the action as the Supreme Court had in the meantime ruled that the minister's decision cannot be quashed unless there is evidence of bias.
>
> 29 The Industrial Court had in the meantime fixed Case No 3/4-457/87 to be heard on 24 April 1989.
>
> 30 I took the decision to discontinue with the originating motion only on 20 April 1989, the day it was set down for hearing.
>
> 31 As both my former partners, Encik K Thevarajah and Encik Surinder, have taken up residence in Australia and they are material witnesses in the Industrial Court case, I instructed my solicitors, Encik P Kuppusamy, to obtain a postponement for me to make arrangements for their attendance at the hearing.
>
> 32 I am informed by my solicitors, Encik Kuppusamy, that he did convey to the solicitor for the first respondent, Encik Vincent Chandran, that he will be seeking a postponement of the Industrial Court case due to the non-availability of the two witnesses on 20 April 1989.
>
> 33 I am informed by Encik Kuppusamy that when the matter came up for hearing in the Industrial Court on 24 April 1989, he applied to the court for a postponement which was objected to by Encik Vincent Chandran.
>
> 34 The learned chairman of the Industrial Court refused the application for adjournment and insisted on proceeding with the hearing.
>
> 35 I am informed that Encik Kuppusamy sought a short adjournment to seek instructions from me. Encik Kuppusamy also told me to send one of my legal assistants to the court to seek an adjournment and that he would like to be discharged.
>
> 36 I then arranged for Cik Wi Yuen of my firm to appear in court to explain my predicament and seek an adjournment. The learned chairman again rejected the application and proceeded to hear the matter ex parte and handed down an award on 2 May 1989. A copy of the award is now produced and shown to me and marked as 'NH 8'.

It is to be noted that this affidavit does not explain why Encik Nordin, the senior partner of the applicant, himself did not or could not attend the hearing before the Industrial Court on 24 April 1989.

Learned counsel, Encik Wong Kim Fatt, for the respondent submitted that this is not a case where the Industrial Court had suddenly fixed the hearing giving the parties insufficient notice so that the applicant was taken by surprise. The applicant is a legal firm which should know what it should do in such mattes as this, and what instructions to give to its solicitors. I agree with Encik Wong. The last notices of hearing before the Industrial Court dated 23 September 1988 were hand-despatched to the parties, and gave the parties seven months to prepare their cases, and to get their witnesses to court. Further, when making its application for certiorari to quash the minister's order, the applicant had not applied to the High Court for an order to stay the proceedings in the Industrial Court pending the disposal of its applica-

tion against the minister's order. Sections 29(d) and 30(1) of the Act states:

> 29 The Court may, in relation to any trade dispute before it or in any proceedings before it:
>
> (d) hear and determine the matter before it notwithstanding the failure of any party to submit any written statement whether of case or reply under rules 9 and 10 to the Court within such time as may be prescribed by the President or in the absence of any party to the proceedings who has been served with a notice or summons to appear;
>
> 30(3) The Court shall make its award without delay and where practicable within thirty days from the date of reference to it of the trade dispute or of a reference to it under section 20(3).

The issue of granting an adjournment was discussed and decided by the Federal Court in *Lee Ah Tee* v *Ong Tiow Pheng & Ors.*[1] Hashim Yeop A Sani FJ (as he then was) delivering the judgment of the court, said at p 109:

> The discretion of the judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick* v *Piller* [1943] 1 All ER 627. We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:
>
> (1) Whether or not a party should be granted an adjournment is wholly at the discretion of the judge. He would exercise the discretion solely upon his view of the facts.
> (2) Prima facie this discretion is unfettered.
> (3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.
> (4) Although an appellate court has power to interfere with the judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tendered to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.
> (5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

Dick v *Piller* reviewed a number of authorities on the exercise of the discretion and amongst the cases cited was *Maxwell* v *Keun & Ors* [1928] 1 KB 645. In that case Atkin LJ set out some important guidelines in his judgment appearing at pp 653 and 657 respectively. It is useful to repeat them and they are as follows:

> 'The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.'
>
> 'In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion.'

Having regard to the background of the proceeding, the conduct of the applicant before the Industrial Court and the requirements of s 30(3) of the Act, I find that the Industrial Court had acted reasonably, and had not acted in excess of its jurisdiction or in breach of the rules of natural justice when it decided to proceed to hear and dispose of the reference notwithstanding the last minute application for the adjournment and the subsequent act of the applicant's counsel discharging themselves from acting for the applicant.

The other grounds contained in the statement pursuant to O 53 of the Rules of the High Court 1980 are:

> Further and/or in the alternative, the decision and orders made by the Industrial Court on 2 May 1989 were made without jurisdiction and/or in excess of jurisdiction in that:
>
> (i) the decision was perverse in that it came to a finding in respect of which no evidence was ever adduced and the finding as such was so devoid of plausible justification that no reasonable tribunal could have reached it;
> (ii) the decision was perverse in the sense that no reasonable tribunal could have reached with the evidence before it;
> (iii) it failed to take into account relevant considerations that it ought to have taken into account and took into account considerations it ought not to have taken into account.

The award of the Industrial Court shows that the Industrial Court had recorded from the respondent oral evidence and affirmation. The respondent had also produced a relevant document. Since the applicant had not filed in the Industrial Court any statement in reply or sent anyone to give evidence, there was no evidence at all for the applicant before the Industrial Court. On the evidence, the Industrial Court made its findings of facts and came to the conclusion that the respondent was constructively dismissed by the applicant without just cause or excuse. The Industrial Court also concluded that it was not proper to order reinstatement in this case and consequently made the appropriate award of compensation and arrears of wages to be paid to the respondent.

In the circumstances, I do not see in what way the award of the Industrial Court was perverse since that court had considered the whole evidence before it. I therefore dismissed this application for an order of certiorari with costs.

Application dismissed.

Solicitors: *P Kuppusamy & Co; Xavier & Chandran.*

Reported by *Zarinah Marican*